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No. ____

In The
Supreme Court of the United States

THOMAS M. GIESBERG,

Petitioner,

v.

JANIE COCKRELL,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. Should the decision below be vacated and remanded for further consideration in light of *Miller-El v. Cockrell*, 537 U.S. 322 (2003), for application of the "debatable" standard mandated by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)?

2. Is it axiomatic "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," warranting a Certificate of Appealabillty under 28 U.S.C. §2253, whenever a petitioner identifies supporting decisions from this Court and circuit courts, and the courts denying such a certificate can find no contrary decisions?

3. Is a timely refiled post-exhaustion habeas application "second or successive" under 28 U.S.C. §2244(b) when the dismissal of the initial §2254 petition was still under adjudication in the court of appeals, a matter decided differently by the Second Circuit in *Ching v. United States*, 298 F.3d 174, 178 (2nd Cir. 2002)?

4. Should the decision below be vacated and remanded for further consideration in light of *Clay v. United States*, 537 U.S. 522, (2003), for application of finality's long-recognized, clear meaning of when "certiorari [is] finally denied," and for a statutory reading of 28 U.S.C. §2244(d)(1)(A) in conformity with this Court's precedents?

5. Is a timely refiled post-exhaustion habeas application "second or successive" under 28 U.S.C. §2244(b) when the initial §2254 petition was dismissed as time-barred, in conflict with this Court's precedents, and did not receive a decision on the merits?

INTERESTED PARTIES

1. Thomas Giesberg, Petitioner.

2. Greg Abbott, Attorney General of Texas

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OPINIONS BELOW

The opinion below is *Giesberg v. Cockrell*, 5th Cir. No. 02-20570 (October 28, 2002) (not reported). *See* Appendix A, App. 1.

Panel rehearing was denied January 15, 2003 (not reported). *See* Appendix G, App. 14. Leave to brief the en banc circuit court on this Court's February 25, 2003 controlling decision *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003) was denied April 1, 2003 (not reported). *See* Appendix F, App. 13. Rehearing en banc was denied April 11, 2003 (not reported). *See* Appendix D, App. 9.

The opinion below denied the requested Certificate of Appealability from the dismissal of Petitioner's §2254 application. *Giesberg v. Cockrell*, Civil Action No. H-02-264 (S.D. Tex. March 18, 2002) (not reported). *See* Appendix C, App. 5.

JURISDICTION

The judgment below was entered on October 28, 2002, App. 1, and a timely petition for rehearing en banc was denied April 11, 2003, App. 9.

The Fifth Circuit Court of Appeals had jurisdiction under 28 U.S.C. §1291. This Court has certiorari jurisdiction under 28 U.S.C. §1254. "...[an] application for a certificate of appealability constitutes a case under §1254(1)." *Hohn v. United States*, 524 U.S. 236, 241 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(b)(1)

A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

28 U.S.C. §2244(b)(3)

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. §2244(d)(1)(A)

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

28 U.S.C. §2244(d)(2)

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection.

28 U.S.C. §2253(c)(1)(A)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

Federal Rules of Civil Procedure, Rule 41 (a) (1)

[in pertinent part] ... an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, ...

STATEMENT OF THE CASE

Petitioner filed a state habeas application, and mistakenly filed his initial §2254 application four days later. He requested to withdraw the initial application without prejudice, for exhaustion, but the district court dismissed it with prejudice as time barred. While this dismissal was being challenged in the Fifth Circuit Court of Appeals, the state review ended. The exhausted claims were immediately refiled in the federal district court, to be within the AEDPA one-year. The district court dismissed the refiling as "successive" under §2244(b), while the initial filing was still in the Court of Appeals. Petitioner contested the applicability of §2244(b) to these circumstances, citing authorities and showing a circuit split. In the decisions below, the district

and circuit courts could not find authorities supporting the use of §2244(b), but a COA was denied anyway.

A jury in Harris County, Texas, found Petitioner guilty of murder and assessed punishment at 65 years in prison. The court of appeals affirmed his conviction. *Giesberg v. State*, 945 S.W.2d 120 (Tex.App.—Houston [1st Dist.] 1997). Discretionary review was granted on the question of whether the trial court erred in refusing a requested jury instruction on the defensive theory of alibi after the evidence fairly raised the issue. The Texas Court of Criminal Appeals affirmed the decision of the court of appeals by a vote of 5-4. *Giesberg v. State*, 984 S.W.2d 245 (Tex.Crim.App. 1998). Petitioner timely sought certiorari on this question on direct appeal, which was denied February 22, 1999. *Giesberg v. Texas*, No. 98-1105, 525 U.S. 1147 (1999)(Mem.). Petitioner then timely filed a motion for rehearing, which this Court denied on April 19, 1999. *Giesberg v. Texas*, 526 U.S. 1082 (1999)(Mem.).

The AEPDA one-year ran for 361 days, until April 14, 2000, when Petitioner's state application for habeas corpus was filed. Because of a breakdown in communication between Petitioner and his retained attorney, Petitioner filed, pro se, his first §2254 federal habeas petition on April 18, 2000 in the United States District Court for the Southern District of Texas, under USDC No. H-00-1358. On August 4, 2000, before an answer by the Respondent, Petitioner filed a motion to withdraw H-00-1358 without prejudice, for exhaustion of the pending state application.

On August 10, 2000, Respondent filed a motion to dismiss H-00-1358 as time barred under 28 U.S.C. §2244(d)(1)(A), asserting that the one-year statute of limita-

tions began to run on February 22, 1999 (when this Court initially denied certiorari). On October 19, 2000, Petitioner responded with a motion, arguing, *inter alia*, the lack of controlling precedent in the Fifth Circuit; that two other circuits hold "finality" comes with the denial of rehearing in this Court (*Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1508 (1st Cir. 1989), *cert. denied* 493 U.S. 1023 (1990) and *Blair v. Armontrout*, 994 F.2d 532, 533 (8th Cir. 1993)); and that to hold otherwise would adopt the **dissenting** opinion in *R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 230 (1944) and would ignore finality's long-recognized, clear meaning of arriving when "certiorari [is] **finally** denied" (*United States v. Johnson*, 457 U.S. 537, 542 n. 8 (1982); *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987); and *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)).

On March 22, 2001, the district court dismissed H-00-1358 with prejudice, holding the AEDPA one-year ran from the February 22, 1999 denial of certiorari, rather than the April 19, 1999 denial of rehearing. *Giesberg v. Johnson*, Civ. No. H-00-1358 (S.D. Tex. March 22, 2001) (unpublished order). The district court made no mention of the contrary holdings of this Court and the First and Eighth Circuits, *supra*. Petitioner argued these holdings in applying for a COA, which was granted by a judge of the Fifth Circuit. *Giesberg v. Johnson*, No. 01-20425 (5th Cir. July 23, 2001) (unpublished order).

On January 23, 2002, while H-00-1358 was on appeal in the Fifth Circuit, Petitioner's state habeas application was denied by the Texas Court of Criminal Appeals. The next day, January 24, 2002, Petitioner filed another petition in the district court, receiving USDC No. H-02-264, refiling thirteen claims and adding three new claims, all developed and

fully-exhausted in the state proceedings. Therefore, all exhausted claims were filed in the district court when 362 days had run from when the "denial ha[d] become final." *Simpson*, 321 U.S. at 230.

With this refiling (H-02-264) was also filed, "Petitioner's Motion to Accept and File New Habeas Petition," arguing that the five days remaining under the AEDPA one-year possibly resumed running upon the denial of the state habeas application, despite the pending appeal of the initial petition (H-00-1358) in the Fifth Circuit (No. 01-20425), and therefore the fully-exhausted claims had to be refiled immediately in the federal court. The arguments in the "Motion to Accept" remain relevant to the questions presented in this Petition. *See* Appendix J, App. 20:[1].

1. Despite the Fifth Circuit's jurisdiction over the initial application (H-00-1358, 5th Cir. No. 01-20425), several courts of appeals have held the new facts and claims could not be amended to that application past the one-year period.

2. Petitioner cited *Duncan v. Walker*, 533 U.S. 167 (2001), which indicated the final days left in the AEDPA limitation period resumed running after the denial of Petitioner's state habeas petition, despite the pendency of the first federal habeas petition in the Court of Appeals;

3. Petitioner explicitly agreed to have the refiled petition "construed as an amendment to the first petition," if "desirable or necessary."

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[1] Relevant excerpts from critical motions are included at App. 16, 18, and 20 to demonstrate that the procedural arguments now presented to this Court were fairly and fully raised in the federal courts below.

4. *Slack v. McDaniel*, 529 U.S. 473, 487-88 (2000) indicated that "nonfrivolous claims developed in the subsequent state exhaustion proceedings" are not "restricted to the claims made in [the] initial petition" and should be treated "as 'any other first petition'" and "not a second or successive petition." Therefore, it is "more appropriate to treat the initial mixed petition as though it had not been filed." App. 20-21.

As the procedures related to this refiled petition continued, leading to the decision presented for review herein, the initial petition remained under adjudication through 2002: On January 31, 2002, Petitioner notified the Fifth Circuit of the refilling and the potential problem with the resumed running of the AEDPA one-year, and requested that the appellate record (in No. 01-20425) be supplemented with copies of the documents newly filed in the district court (granted April 5, 2002). On April 23, 2002, a panel of the Fifth Circuit Court of Appeals ruled finality arrived with the initial denial of certiorari on direct review. Despite full briefing, the panel refused to follow or even mention the contrary holdings of this Court (such as *Simpson, supra*) and ignored the circuit split thus created with the First and Eighth Circuits (*Hanover* and *Blair, supra*). *Giesberg v. Cockrell*, No. 01-20425, 288 F.3d 268 (5th Cir. 2002), *reh. denied* 45 Fed.Appx. 327 (5th Cir. July 1, 2002)(mem), *cert. denied* No. 02-522, 123 S.Ct. 663 (December 9, 2002). Rehearing and certiorari petitions stressed, *inter alia*, that the ruling adopted this Court's dissenting opinion in *Simpson*, to no avail.

The refiled petition (H-02-264) was filed within one year of the time certiorari review of the direct appeal was "finally denied" (*Johnson, supra*) less tolling during state habeas review, and no court has applied the time bar claim under

§2244(d)(1). Rather, on March 18, 2002, while the initial petition was on appeal, the district court dismissed the refiled petition without prejudice, treating it as a successive petition requiring an order of authorization under 28 U.S.C. §2244(b)(3). *Giesberg v. Cockrell*, Civ. No. H-02-264 (S.D. Tex. March 18, 2002) (unpublished order). Appendix C, App. 5. The district court did not address any of the arguments from the "Motion to Accept," Appendix J, App. 20.

In response to the dismissal under §2244(b)(3), Petitioner filed a Rule 59(e) motion in the district court, arguing three applicable determinations from *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997):

(1) A "refiled petition is merely a continuation of [the] first collateral attack, not a 'second or sucessive' petition within the meaning of §2244(b)," irrespective of a new docket number. Hence,

(2) A motion to the Court of Appeals for §2244(b)(3) authorization to file a second or successive application is "unnecessary."

(3) It was proper for Petitioner to "file his petition directly in the district court."

Citing *Gasery*, 116 F.3d at 1052. Petitioner pointed out that "[t]he factors that distinguish Petitioner's case from *Gasery* are the very factors that made refiling necessary immediately upon the January 23, 2002 exhaustion of Petitioner's state remedies." Gasery's earlier petition was dismissed without prejudice for state exhaustion—an action Petitioner had properly requested on August 10, 2000—whereas Peti-

tioner's initial petition was still under adjudication in the Court of Appeals. Petitioner also requested a stay under Fed. R.Civ.P. 62 until the final adjudication of the initial petition.

Petitioner's Rule 59(e) motion was denied April 15, 2002. The district court found *Gasery* inapplicable, because "petitioner's first federal habeas action was dismissed with prejudice and an appeal of the dismissal is currently pending before the Fifth Circuit.... Petitioner's remedy is to await the decision of the Fifth Circuit on his appeal." Appendix B, App. 4. The district court's ruling did not attempt to explain why this distinction made §2244(b) applicable, did not cite any authority more analogous than *Gasery*, did not grant the requested stay, and did not address the repercussions of the resumed running of the AEDPA one-year.

Petitioner timely filed notice of appeal on May 14, 2002 and applied for a certificate of appealability, receiving Fifth Circuit No. 02-20570. Petitioner requested to appeal whether the refiling "consistutes a 'second of successive' petition under 28 U.S.C. § 2244(b)(3)," and briefed the arguments and authorities presented to the district court. Pursuant to Fed.R.App.P. 28(j) and 5th Cir. R. 28.5, Petitioner promptly notified the Fifth Circuit (by letter of September 10, 2002) of the publication of *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002), which held under materially indistinguishable facts:

> (1) the adjudication of the first petition was not complete; (2) therefore, the new petition was not "second or successive" under the AEDPA; and (3) the District Court should have construed the second petition as an amendment to the first.

Petitioner's "Application for Certificate of Appealability" cited the COA standard from *Slack*, 529 U.S. at 484 (2000): "When the district court denies a habeas petition on procedural grounds ... a COA should issue when ... jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Petitioner noted that "no authorities were cited in the summary dismissal," and then proceeded to brief decisions from this Court, the Fifth Circuit, and other circuit courts, all showing §2244(b) was inapplicable to the refiled petition. Petitioner also cited the standard of review: "'We review *de novo* the district court's denial of [a] habeas application on procedural grounds.' *Emerson v. Johnson*, 243 F.3d 931, 932 (5th Cir. 2001)."

On October 28, 2002, Circuit Judge Benavides denied a COA for H-02-264, explaining only, "Giesberg has not shown that the district court erred in determining that his habeas application is successive." *Giesberg v. Cockrell*, No. 02-20570 (5th Cir. October 28, 2002) (unpublished order). Appendix A, App. 1.

On January 15, 2003, a panel of the Fifth Circuit denied Petitioner's petition for reconsideration, without an opinion. *Giesberg v. Cockrell*, No. 02-20570 (5th Cir. January 15, 2003). Appendix G App. 14. Petitioner timely filed the "Appellant's Petition for Rehearing En Banc," which arrived at the Fifth Circuit on February 28, 2003, but was prepared and sent for copying, binding, and mailing weeks before. Petitioner specifically pointed out that the panel's denial of a COA failed to apply the debatability standard mandated by *Slack*, 529 U.S., at 484, and left a circuit split with *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002). Relevant excerpts are at Appendix I, App. 18.

On February 25, 2003, this Court decided *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003). That same day, Petitioner mailed to the Fifth Circuit Court of Appeals a "Motion for Additional Briefing" (filed March 3, 2003). Petitioner requested to bring to the attention of the en banc Fifth Circuit that this Court had just reaffirmed "the need to issue a COA when matters are debatable, and not require the petitioner to prove he should prevail (for a COA)." Petitioner also cited authority that this Court's construals of statutes are immediately applicable. Appendix H, App. 16-17.

On April 1, 2003, the same Circuit Judge who originally denied a COA, Appendix A, App. 1, also denied Petitioner's "Motion for Additional Briefing". *Giesberg v. Cockrell*, No. 02-20570 (5th Cir. April 1, 2003) (unpublished order). Appendix F, App. 13.

Petitioner promptly mailed a "Petition for Reconsideration by a Panel," challenging this denial by the same Circuit Judge, but it did not arrive at the Court of Appeals until April 11, 2003 (Appendix E, App. 11), the same day the petition for rehearing en banc was denied. *Giesberg v. Cockrell*, No. 02-20570, (5th Cir. April 11, 2003) (unpublished order). Appendix D, App. 9.

REASONS FOR GRANTING THE PETITION

A. Introduction: Why certiorari should be granted

The decision below warrants review or remand, because it presents several important and recurring questions of federal law, conflicts with other circuit courts, and clashes with contemporaneous holdings of this Court:

1. The decision below from the Fifth Circuit denied a Certificate of Appealability (COA) by deciding the merits rather than applying the "debatability" standard. This practice of the Fifth Circuit Court of Appeals was condemned in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), and the decision below should be vacated and remanded for further consideration under the "debatability" standard reemphasized in *Miller-El*.

2. The important federal question of the meaning of "debatable," should be settled by this Court. Conflicting interpretations are used in the circuit and district courts. The Fifth Circuit has implemented a standard of "debatable" that can never be met, no matter how many jurists of reason disagree with an unsupported decision in the Fifth Circuit.

3. The decision below from the Fifth Circuit conflicts with the decision of the Second Circuit Court of Appeals on the same important matter (whether a refiled post-exhaustion habeas application is "second or successive" under 28 U.S.C. §2244(b) when the dismissal of the initial §2254 petition was still under adjudication in the court of appeals): *Ching v. United States*, 298 F.3d 174, 178 (2nd Cir. 2002).

4. This refiled §2254 application is timely under the line of precedent reaffirmed in *Clay v. United States*, 537 U.S. 522, ___, 123 S.Ct. 1072, 1076 (2003); however, this long-recognized precedent was ignored in the Fifth Circuit in order to deviate from the holding in *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000) (that a post-exhaustion refiling is not a "second or successive" petition under §2244(b)). A remand for application of *Clay*'s mandate should lead to a clean application of *Slack, supra*, and thus resolve the §2244(b) questions.

5. The Fifth Circuit has applied §2244(b) and §2244(d) in a way that conflicts with the relevant decisions of this Court. Unless reviewed and corrected, this will have the consequences of denying §2254 applicants their first and only review on the merits.

B. A single judge of the Fifth Circuit denied a COA in the manner condemned in *Miller-El v. Cockrell*, and then that same single judge denied Petitioner's motion to brief the en banc circuit court on *Miller-El*'s controlling mandate, hence the decision should be remanded for consideration in light of *Miller-El*.

This procedural decision has arrived at this Court without the mandatory consideration of "debatability" reaffirmed in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003), and thus should be reversed or remanded. *Miller-El* (at 123 S.Ct. 1039) reemphasized the "debatable" standard from *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), announced in *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983).

The Fifth Circuit Court of Appeals decided this important federal question in a way that conflicts with *Miller-El*,

by completely discarding debatability of the issues, instead holding Petitioner had to show "that the district court erred in determining that his habeas corpus application is successive."[2] App 1.

But **had** Petitioner shown that the district court **erred**, then he would have **prevailed** on the procedural question of whether §2244(b) applied.

> The holding in *Slack* would mean little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail.

Miller-El, supra at 123 S.Ct. 1039.

The issue brought to the circuit court was whether the application was successive under §2244(b). Whether it was correct to invoke this procedural bar is debatable (and decided differently by all other authorities), and thus a reasonable jurist **could** conclude that the district court erred. By deciding the merit of this debatable issue without granting a COA, the single judge committed a jurisdictional error:

> When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

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[2] The Court is asked to note this is not the *de novo* review that is naturally incorporated in the required analysis of debatability, and is the declared standard in the Fifth Circuit: "We review *de novo* the district court's denial of [a] habeas application on procedural grounds." *Emerson v. Johnson*, 243 F.3d 931, 932 (5th Cir. 2001)

Id. at 123 S.Ct. 1039.

Petitioner cited *Slack* and *Barefoot* in his "Petition for Reconsideration by a Panel" to the Fifth Circuit, identifying from the first line of the first page: "Giesberg did not have to show 'the district court erred'; he merely has to show the issues are debatable." Petitioner continued on, citing opinions of this Court such as *Slack, supra* at 487-88, and *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998), as authorities that 28 U.S.C. §2244(b) does not apply to a post-exhaustion refiling.

In response, the panel denied the petition for reconsideration without an opinion. Appendix G, App. 14. Petitioner timely applied for rehearing en banc, presenting as his first issue meriting consideration:

> The decision conflicts with, ignores, and refuses to apply the debatability standard mandated by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), despite the fact that all authorities support the petitioner and were unrefuted, while no contrary authorities were found by the district or circuit judges.

App. 18. See also App. 16. In support of his request for a COA, Petitioner likewise cited the "debatable" standard from *Slack* and *Barefoot*, App. 19 continuing on to argue:

> **This COA denial makes "debatable" a meaningless or unreachable standard.** It is axiomatic that jurists of reason find an issue "debatable" when every authority entered in the debate supports the petitioner and is unrefuted.

App. 19

On February 25, 2003, as the petition for rehearing en banc was being sent to the Fifth Circuit, this Court issued *Miller-El,* completely supporting and reemphasizing the precedents and principles the Petitioner had explicitly argued in seeking a COA. Petitioner immediately submitted (filed March 3, 2003) a "Motion for Additional Briefing." Petitioner noted, "Additional briefing will aid in applying *Miller-El v. Cockrell* to the question of whether the panel properly followed Supreme Court standards regarding the issuance of a COA under 28 U.S.C. §2253." Appendix H, App. 16.

However, the same single judge (the Hon. Fortunate P. Benavides), who denied a COA by deciding the merits, also denied additional briefing, App. 13, on April 1, 2003, and then rehearing en banc was denied April 11, 2003, App. 9, before Petitioner could file a petition for panel reconsideration of the single judge's denial of briefing on *Miller-El,* App. 11.

If this Honorable Court does not choose to review the other questions presented, Petitioner respectfully requests the decision below be vacated and remanded for further consideration in light of *Miller-El,* for application of the "debatable" standard that was ignored in the first excursion through the Fifth Circuit Court of Appeals.

C. The Fifth Circuit rendered "debatable" meaningless by denying a COA despite the unanimity of decisions in support of the Petitioner, so this Court should rule that such circumstances entail debatability.

This Court reiterated in *Miller-El, supra* at 123 S.Ct. 1039, the debatability standard promulgated in *Slack, supra.* The

debatability standard is eviscerated if district and circuit courts may deny a Certificate of Appealability to a petitioner who presents a surfeit of authoritative decisions, all in support of his issues, and no decisions can be found that agree with the district court's procedural ruling.

This Court's COA standard, "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack, supra* at 484, is perspicuous, and is followed in most federal courts.

Circuit Judge Gregory of the Fourth Circuit Court of Appeals, in a concurring opinion in *Wade v. Robinson*, 327 F.3d 328 (4th Cir. 2003), explained his grant of a COA to the petitioner Wade. Judge Gregory first cited *Miller-El, Slack,* and *Barefoot* for the debatability standard established by this Court, and then continued:

> Because reasonable jurists from two of our sister circuits have *actually* disagreed as to the resolution of this issue of statutory construction, Wade **obviously has met his burden** on the second prong of *Slack*. Accordingly, **there can be no doubt that a COA must issue.**

Wade, supra at 335 (boldface emphasis added).

In *Robinson v. Stegall*, 157 F.Supp.2d 802 (E.D.Mich. 2001), one "reasonable Michigan Court of Appeals jurist wrote in dissent," (in an unpublished opinion - see *Id.* at 813, n. 5), and the federal district court therefore concluded a COA should be available on that issue. *Id.* at 824.

At the other extreme, "jurists of reason" and "debatable" are meaningless terms in the Fifth Circuit Court of

Appeals. In *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000), a COA was denied, despite the dissenting opinion of Circuit Judge Dennis. **Apparently, a circuit judge in the Fifth Circuit is not axiomatically a "jurist of reason."** Yet this Court later agreed with Judge Dennis: *Penry v. Johnson*, 532 U.S. 782 (2001)

Petitioner presented in the Fifth Circuit precedent from this Court, other circuit courts, and the Fifth Circuit itself, in support of his issues. In response, the district court and the Fifth Circuit Court of Appeals were unable to cite any contrary precedent, yet a COA was denied.

Petitioner presented *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002), involving materially- indistinguishable facts: An initial habeas petition was dismissed as time-barred. While that dismissal was on appeal, another petition was filed. The Second Circuit relied upon both *Slack* and *Stewart, supra*, to find that the new petition could not be "second or successive" under the AEDPA, because the dismissal of the first petition was still on appeal. *Ching, supra* at 178.

When a petitioner demonstrates that another circuit court of appeals has resolved the issue in a different manner, on a question unanswered in the circuit court, it is axiomatic that the issue is debatable among jurists of reason, and a COA must issue.

The harsh gatekeeping mechanisms in §2244(b) simply do not apply to this timely refiled post-exhaustion §2254 application. In support, Petitioner cited: *Slack v. McDaniel, supra; Stewart v. Martinez-Villareal, supra; In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997); *United States v. Orozco-Ramirez*, 211 F.3d 862, 868 (5th Cir. 2000); *Graham v. Johnson*, 168 F.3d 762,

777 (5th Cir. 1999), *cert. denied* 529 U.S. 1097 (2000); *Baris v. Sulpicio Lines Inc.*, 74 F.3d 567, 572 (5th Cir. 1996), *cert. denied* 520 U.S. 1168 (1997) (relying upon *Costello v. United States*, 365 U.S. 265, 286 (1961) to show "the merits of the case" were never addressed); *In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999); *Mancuso v. Herbert*, 166 F.3d 97, 101 (2nd Cir 1999); and *Pratt v. United States*, 129 F.3d 54, 60 (1st Cir. 1997); *inter alia*. These authorities all promoted the right to file another petition, as reviewed at pages 26-28, *infra*.

In response, the district and circuit courts cited no authorities in support of their application of §2244(b) to the unique facts presented, yet a COA was denied. This makes "debatable" a meaningless or unreachable standard.

The degree to which contrary and dissenting opinions make an issue "debatable" and require issuance of a COA is an important federal question that should be settled by this Court. It is a question that affects all COA applicants. The Fifth Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings, and defined "debatable" in a way that conflicts with relevant decisions of this Court and of other federal courts.

D. The decision below is in conflict with the Second Circuit, which held 28 U.S.C. §2244(b) is inapplicable to this procedural situation, and this conflict should be resolved by this Court.

In holding this refiled §2254 application is "second or successive," the Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

Ching v. United States, 298 F.3d 174 (2nd Cir. 2002), was decided upon materially indistinguishable facts: An initial habeas petition was dismissed as time-barred. While that dismissal was on appeal, another federal petition was filed. The Second Circuit relied upon *Stewart, supra*, and *Slack, supra*, to hold: (1) the adjudication of the first petition was not complete; (2) therefore, the new petition was not "second or successive" under the AEDPA; and (3) the district court should have construed the second petition as an amendment to the first. *Ching, supra* at 178.

Petitioner timely refiled his fully exhausted claims in the district court (No. H-02-264) the day after the Texas Court of Criminal Appeals issued an order denying Petitioner's state post-conviction application. The dismissal of the initial petition (No. H-00-1358) was at that time under appeal (Fifth Circuit No. 01-20425).

With the filing of H-02-264, Petitioner filed a motion (see Appendix J, App. 20-21) explicitly agreeing "to have this new petition construed as an amendment to the first petition." App. 21. Petitioner pointed out, "several court of appeals have held that the AEDPA prevents the amendment of new facts to a federal habeas petition past the one year period, even when it is unquestioned that the federal courts have obtained jurisdiction." App. 20. Petitioner also identified: "*Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120 (2001) also supports the idea that the AEDPA limitation period resumed running after the denial of Petitioner's state habeas petition, despite the pendency of the first federal petition in the Court of Appeals." App. 21.

The district court did not mention this need to refile immediately in its March 18, 2002 order dismissing the re-

filed petition as successive under §2244(b). Appendix C, App. 5. Following Petitioner's 59(e) motion (which included a request for a stay instead of the dismissal), the district court likewise did not address these amendment concerns in its April 15, 2002 order. Appendix B, App. 3. The district court noted only, "Petitioner's remedy is to await the decision of the Fifth Circuit on his appeal." App. 3.

This holding squarely conflicts with the Second Circuit's holding in *Ching, supra,* construing such filings as amendments to the petition on appeal at that time. This Court, pursuant to *Slack, supra,* permits refiling or amending the original federal petition with the new and fully-exhausted state claims. The district court's "remedy" to wait upon the circuit court's resolution of the appeal would almost always cause the untolled one-year statute of limitation to pass while waiting, because the appeal in the circuit court does not toll the statute of limitations. *Duncan v. Walker, supra.*

At least five circuit courts have refused to allow the amendment of new facts to a pending federal habeas application after the AEDPA one-year has expired, despite the continuous federal jurisdiction: *Dean v. United States,* 278 F.3d 1218, 1222 (11th Cir. 2002); *United States v. Pitman,* 209 F.3d 314, 317 (4th Cir. 2000); *United States v. Duffus,* 174 F.3d 333, 337 (3rd Cir. 1999); *United States v. Craycraft,* 167 F.3d 451, 457 (8th Cir. 1999); and *Rodriguez v. United States,* 286 F.3d 972, 981 (7th Cir. 2002), *cert. denied* 123 S.Ct. 46 (2002)

The *Ching* solution allows the timely entry of all properly-exhausted claims before the expiration of the one-year—the goal of Congress in enacting the AEDPA—without unnecessarily triggering the harsh gatekeeping provisions of §2244(b). Accepting exhausted claims as amend-

ments is "in another sense *required* by law (because they would otherwise be barred by the 1-year statute of limitations)," adopting the reasoning of *Carey v. Saffold*, 536 U.S. 214, ____, 122 S.Ct. 2134, 2138 (2002) (emphasis in original).

This important question of federal law has not been, but should be, settled by this Court, resolving the conflicting decisions of the United States courts of appeals.

E. This refiled §2254 application is timely under the line of precedent reaffirmed in *Clay v. United States*, precedent that has yet to be considered by the Fifth Circuit, hence the decision should be remanded for consideration in light of Clay.

This refiled §2254 application is timely under the line of precedent and the statutory reading mandated in *Clay v. United States*, 537 U.S. 522, ____, 123 S.Ct. 1072, 1076 (2003). This application was refiled after state exhaustion, within one year of this Court's denial of rehearing on direct appeal (*Giesberg v. Texas*, 526 U.S. 1082 (April 19, 1999)), tolled only for the time the post-conviction application was pending in the Texas courts. Neither the district nor circuit court declared this refiling untimely. However, the only factor that differentiates this petition from the petition in *Slack, supra*, is that Petitioner's initial application was dismissed with prejudice as time-barred, contrary to the long-recognized, clear meaning of "finality" reaffirmed in *Clay*. A remand for application of this Court's settled interpretation of "denial of a petition for certiorari" will remove the only obstacle to the clean application of this Court's holding in *Slack, supra* at 485-86 (a post-exhaustion refiling is not a "second or successive" petition under §2244(b)).

Clay, 123 S.Ct. at 1076, reaffirmed: "we presume that Congress expects its statutes to be read in conformity with this Court's precedents," and therefore "our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of 'becomes final' in §2255." More than fifty years before the AEDPA, this Court carefully examined when Congress said a decision becomes **final** "Upon the denial of a petition for certiorari," and held it means: "No mandate issues on denial of certiorari, ...", "...we regard denials of certiorari as qualified until the 25-day period expires, ...", and that "jurisdiction" is not lost until "under our rules our denial has become final." *R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 229-230 (1944).

Clay, 123 S.Ct. at 1076, noted "finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, ..." and cited *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6 (1987); and *United States v. Johnson*, 457 U.S. 537, 542, n. 8 (1982). As carefully specified starting with *Johnson*, *Id.*, all such precedents took pains to identify the attachment of finality as when a petition has been "finally denied." Given the "long-recognized, clear meaning" starting with *Simpson* in 1944 - which defined "the denial of a petition for certiorari" - the omission of "finally" in the paraphrasing in *Clay* does not revise the precedent. *Cf.* Robert L. Stern, Eugene Gressman, Stephen H. Shapiro, & Kenneth S. Geller, *Supreme Court Practice*, §15.4 (8th Ed. 2002) ("[T]he Supreme Court's denial of certiorari is 'qualified' and not final until the expiration of the period in which a petition for rehearing is allowed.").

The First Circuit presaged *Clay* in *Derman v. United States*, 298 F.3d 34, 41 (1st Cir. 2002), *cert. denied* 123 S.Ct. 35, 636 (2002) ("final" is a term that "has a well-defined meaning in federal law"), citing *Hanover Ins. Co. v. United States*, 880 F.2d 1503, 1507-09 (1st Cir. 1989), *cert. denied* 493 U.S. 1023 (1990). *Hanover* determined this Court's rehearing period precedes finality, based upon *Simpson, inter alia*, with "final" not meaning the same as "unsuspended," *Hanover, supra* at 1508, n. 5. This clear meaning of "final" was followed in *Blair v. Armontrout*, 994 F.2d 532, 533 (8th Cir. 1993).

The Fifth Circuit refused to read §2244(d)(1)(A) in conformity with this Court's precedents. Despite heavy briefing of all the aforementioned precedents, including *Simpson* and *Johnson, supra*, this Court's long-recognized meaning of "became final" was ignored and this Court's precedents were unmentioned. *Giesberg v. Cockrell*, 288 F.3d 268 F.3d 268 (5th Cir. 2002), *cert. denied* 123 S.Ct. 663 (2002). The Fifth Circuit ignored the intent of Congress, which surely drafted §2244(d) in conformity with the meaning of "final" in *Simpson, supra*. Instead, the Fifth Circuit conflated "not suspended" with "final," based upon an unschooled reinterpretation of this Court's Rule 16.3, a reinterpretation soundly debunked in *Hanover, supra* at 1508, n. 5.

Upon remand, the application of the precedents and statutory readings mandated in *Clay*, 123 S.Ct. at 1076, to "final" in §2244(d)(1)(A) will lead to the ineluctable conclusion that Congress used "final" as interpreted in *Simpson, supra, i.e.*, arriving after the rehearing period, when "finally denied" (*Caspari, Griffith*, and *Johnson, supra*). A remand for further consideration in light of *Clay* will thus obviate the only objection to treating this timely post-exhaustion refiling "as 'any other first petition'," *Slack, supra* at 487.

F. The decision below should be reversed, because precedent dictates that §2244(b) is inapplicable to a timely refiled post-exhaustion habeas application when the initial petition did not receive a decision on the merits

The Fifth Circuit Court of Appeals has applied 28 U.S.C. §2244(b) in a way that conflicts with the relevant decisions of this Court. Unless reviewed and corrected, such denials will deprive applicants of their first and only review on the merits.

The petition was timely refiled the day after state exhaustion, within one year of this Court's denial of rehearing on direct appeal. Note *Slack, supra* at 485-86: "A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition."

Neither the district nor circuit courts have tried to dismiss the refiling as time-barred under §2244(d)(1)(A), nor could such be done under the "unvarying understanding of finality for collateral review purposes" reaffirmed in *Clay*, 123 S.Ct. at 1076. This understanding was clearly defined—and a dissenting opinion favoring an earlier date for finality was rejected—by this Court in *Simpson*, 321 U.S. at 230. See Judge Selya's careful application of *Simpson* in *Hanover*, 880 F.2d, at 1507-09, applied to the AEDPA in *Derman*, 298 F. 3d, at 41 ("final" is a term that "has a well-defined meaning in federal law"). This Court specified the date when "certiorari [is] finally denied") (emphasis added) in *Johnson*, 457 U.S., at 542, n. 8.

Clay is immediately applicable to the statutes relevant to these proceedings. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90 (1993). Hence, this refiling is timely under §2244(d)(1)(A) ("final by the conclusion of direct review"), and any claim to the contrary is groundless and may be quickly brushed aside.

Nor does the dismissal with prejudice of the initial §2254 application implicate §2244(b). Section 2244(b)(1) concerns only whether "[a] claim ... was presented in a prior application," not whether a procedural bar from another section of the statute might apply. Precedent indicates this refiling cannot be "second or successive," because the initial petition (1) was never ripe for review, (2) was never adjudicated on the merits, and (3) was still under adjudication at the time of the refiling.

Petitioner, in his application for COA and petitions for reconsideration, described how he requested dismissal of the initial petition without prejudice for state exhaustion, before Respondent's answer, Petitioner's right "without order of court," Fed.R.Civ.P. 41(a)(1). Petitioner cited *Slack, supra* at 488: "*Rose v. Lundy* dictated that, whatever particular claims the petition contained, none could be considered by the federal court."

The Fifth Circuit had agreed, in *United States v. Orozco-Ramirez*, 211 F.3d 862, 868 (5th Cir. 2000), that the key point in *Stewart, supra*, is that the "claim was not ripe for disposition...and, therefore, was not 'second or successive' under AEDPA." *Orozco-Ramirez, Id.*

Section 2244(b) simply cannot apply, because the initial application was never ripe for disposition. *See* 2 Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* §28.3a, at 275 (2d ed. Supp. 1997) (emphasis in original):

> Applying the no-second-bite rule makes no sense when a prior petition gave the prisoner what amounts to no bite at the apple—because the prior petition involved a different apple, because no bite was taken when the apple previously was before the court, or because no bite *could have been taken* at that time because the claim had not yet come into existence or would not have been cognizable at the time of the earlier petition.

Furthermore, the initial application was never adjudicated on the merits. As in *Sanders v. United States*, 373 U.S. 1, 19 (1963), "...the denial ...was not on the merits. It was merely a ruling that petitioner's pleading was deficient." Therefore, the timely refiling of all fully-exhausted claims does not implicate the "abuse of the writ" doctrine that forms "[t]he core of AEDPA restrictions on second or successive" petitions, *Orozco-Ramirez, Id.* The Respondent filed only a motion to dismiss the initial petition as time-barred, and, therefore, in the words of the Fifth Circuit, never "incurred the inconvenience of preparing to meet the merits of the case." *Baris v. Sulpicio Lines Inc.*, 74 F.3d 567, 572 (5th Cir. 1996), *cert. denied* 520 U.S. 1168 (1997), relying upon *Costello v. United States*, 365 U.S. 265, 286 (1961). The Second Circuit also questioned whether a "dismissal for untimeliness...operated as an adjudication on the merits," and found, "[t]he teachings of the Supreme Court in *Costello v. United States*, 365 U.S. 265 (1961) require a different analysis and result." Longstanding Supreme Court precedents indi-

cate the original bar on the remedy did not "extinguish the right or cause of action;" *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 617 (1836); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

Petitioner, in his "Application for Certificate of Appealability," cited other authorities that rely upon this Court's decision in *Stewart, supra*, to find the right to file a subsequent petition if there was no adjudication on the merits initially: *Graham v. Johnson*, 168 F.3d 762, 777 (5th Cir. 1999) ("the habeas petitioner does not receive an adjudication of his claim."); *Mancuso v. Herbert*, 166 F.3d 97, 101 (2nd Cir. 1999) (claim "*never* adjudicated by a federal court, cannot constitute a 'second or successive' petition *under the AEDPA*.") (emphasis in original); *In re Page*, 179 F.3d 1024, 1025 (7th Cir. 1999) ("a dismissal of a petition for habeas corpus for technical procedural reasons....does not affect the petitioner's right to file a subsequent petition"); and *Pratt v. United States*, 129 F.3d 54, 60 (1st Cir. 1997) ("a numerically second petition is not 'second or successive' if the earlier petition terminated without a judgment on the merits.").

If the district court was correct in finding this refiling to be a second or successive petition, then such reasoning could be used by any district court to defeat the permission to bring all "nonfrivolous claims developed in the subsequent state exhaustion proceedings," *Slack, supra* at 487, *viz*: a court could dismiss any unexhausted petition with prejudice (incorrectly), then, while the dismissal was on appeal and upon state exhaustion, hold attempts to bring the exhausted claims within the AEDPA time limit barred as second or successive.

The third reason §2244(b) cannot apply - because the initial application was still under adjudication at the time of the refilling - was expounded upon in section D above (pages 19 through 22), relying upon the holding in *Ching, supra.*

The misuse of the bar on second or successive petitions by the Fifth Circuit is an extreme departure from the accepted and usual course of judicial proceedings, and decides an important question of federal law in a way that conflicts with the relevant decisions of this Court and of precedent in the courts of appeals. Unless reviewed and corrected, this misuse of §2244(b) will deprive applicants of their first and only review on the merits.

This issue arrives at this Court with no analysis of the authorities (all of which support the Petitioner) having been conducted in the district or circuit courts. Petitioner respectfully requests that this Honorable Court resolve this issue, or hold, at the very least, that this issue is debatable among jurists of reason, and thus hold that a COA should issue.

CONCLUSION

For all the foregoing reasons. Petitioner respectfully requests that this Honorable Court grant his petition for writ of certiorari, vacate the decision of the Fifth Circuit Court of Appeals below, and either rule in his favor on the questions presented or remand for further consideration in light of this Court's recent decisions.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20570
USDC No. H-02-CV-264

THOMAS M. GIESBERG,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Oct. 28, 2002)

O R D E R:

Thomas M. Giesberg, Texas state prisoner number 721911, has applied for a certificate of appealability ("COA") for an appeal from the district court's order dismissing his application for a writ of habeas corpus. 28 U.S.C. §2253(c)(1)(A). Giesberg has not shown that the district court erred in determining that his habeas application is succes-

sive. *See Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000) (COA standard). A prisoner seeking to file a second or successive application for a writ of habeas corpus in the district court must move for leave to do so in the "appropriate court of appeals." 28 U.S.C. §2244(b)(3)(A); *see Felker v. Turpin*, 518 U.S. 651, 664 (1996). Because Giesberg has not obtained leave from this court to file a second or successive habeas application, the district court did not have jurisdiction to consider his habeas application. *See United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). COA is DENIED.

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS M. GIESBERG, TDCJ-ID #721911, Petitioner,	§	CIVIL ACTION NO. H-02-264
v.	§	
JANIE COCKRELL, Respondent.	§	

(Entered Apr. 15, 2002)

ORDER

Petitioner Thomas M. Giesberg's first federal habeas petition challenging his state felony conviction on unexhausted claims was dismissed as time-barred. *Giesberg v. Johnson*. Civil Action No. H-00-1358 (S.D. Texas, March 21, 2001). Giesberg's appeal of the dismissal is pending before the Fifth Circuit. *Giesberg v. Cockrell*, No. 01-20425 (5th Cir.). After his state remedies were exhausted, petitioner filed a second petition seeking federal habeas corpus relief from his state felony conviction. (Docket Entry No. 1). On March 15, 2002, the Court dismissed the second petition as successive. (Docket Entries No.4, No.5). Petitioner has now filed a "Motion to Alter or Amend Judgment," pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (Docket Entry No.6).

A Rule 59(e) motion may be granted if the moving party demonstrates any of the following: (1) the judgment was

based upon a manifest error of law or fact; (2) there is newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; and (4) there is an intervening change in controlling law. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §2810.1 (2d ed. 1995). However, a Rule 59(e) motion may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Id.*

Petitioner argues that his second habeas petition should be treated as a continuation of the first collateral attack as in *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997). *In re Gasery* merely held that filing of a §2254 petition after dismissal without prejudice was not "successive" within meaning of 28 U.S.C. §2244 (b) (3). *Id.* at 1051-52. Unlike the petition in *Gasery*, petitioner's first federal habeas action was dismissed with prejudice and an appeal of the dismissal is currently pending before the Fifth Circuit. Therefore, the holding of *Gasery* is inapplicable to petitioner's case. Petitioner's remedy is to await the decision of the Fifth Circuit on his appeal.

Accordingly, the Court **DENIES** petitioner's Motion to Alter or Amend Judgment. (Docket Entry No. 6).

The Clerk will provide copies of this Order to the parties.

SIGNED at Houston, Texas, on April 13, 2002.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

THOMAS M. GIESBERG, TDCJ-ID No. 721911, Petitioner,	§	CIVIL ACTION NO. H-02-264
v.	§	
JANIE COCKRELL Director, Texas Department of Criminal Justice, Institutional Division	§	
Respondent.	§	

(Entered Mar 18, 2002)

MEMORANDUM AND ORDER ON DISMISSAL

Petitioner Thomas M. Giesberg, a state inmate, seeks habeas corpus relief under 28 U.S.C. §2254. In 1995, Giesberg was convicted of murder in the 339th District Court of Harris County, Texas in cause number 638475. A jury assessed punishment at sixty-five years confinement in the Texas Department of Criminal Justice-Institutional Division. (Docket Entry No.1). The First Court of Appeals for the State of Texas affirmed the conviction. *Giesberg v. State*, 945 S.W.2d 245 (Tex. App. -Houston [1st Dist.] 1996). Giesberg filed a petition for discretionary review, and the Texas Court of Criminal Appeals affirmed the conviction on September 30,

1998. *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998). The United States Supreme Court denied *certiorari* on February 22, 1999. *Giesberg v. Texas*, 525 U.S. 1147 (1999). Thereafter, Giesberg's petition for rehearing was denied on April 19, 1999. *Giesberg v. Texas*, 526 U.S. 1082 (1999).

Giesberg filed a state application for writ of habeas on April 14, 2000. The Texas Court of Criminal Appeals denied the state writ application on January 23, 2002. (Docket Entry No.1).

On April 20, 2000, Giesburg [sic] filed a federal application for a writ of habeas corpus challenging the same state court conviction. *Giesberg v. Johnson*, Civil Action No. H-00-1358 (S.D. Texas, March 21, 2001). This court dismissed Giesburg's [sic] habeas petition, with prejudice, as time-barred. *Id.* (Docket Entries No.7, No.8). Giesburg's [sic] appeal of the dismissal is pending before the Fifth Circuit. *Giesberg v. Cockrell*, No. 01-20425 (5th Cir.).

Giesburg [sic] has now filed a second federal application for a writ of habeas corpus challenging the same state court conviction (Docket Entry No.1) and a motion to accept and file a new habeas petition. (Docket Entry No.2) .

In general, federal habeas petitioners must bring their claims in one action. 28 U.S.C. §2244 (b) provides as follows, in pertinent part:

> (1) A claim presented in a second or successive habeas corpus application under §2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under §2254 that was not

presented in a prior application shall be dismissed unless-

> (A) the applicant shows that the claims rely on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

A district court may hear a claim not presented in a prior federal application only if the court of appeals issues an order of authorization. 28 U.S.C. §2244 (b) (3) . Any claim that was raised in a prior federal habeas application is not subject to adjudication by the district court and must be dismissed. 28 U.S.C. §2244(b)(1).

There is no allegation or showing that petitioner has sought or received authorization from the court of appeals to proceed in this court as to any new claims he is raising. Accordingly, this action is **DISMISSED** without prejudice to seeking authorization from the court of appeals to proceed in this court on any new claims. Giesburg's [sic] motion to accept and file new habeas petition (Docket Entry No.2) and his motion requesting appointment of counsel (Docket Entry No.3) are **DENIED.**

This court finds that petitioner has not made a substantial showing of the denial of a constitutional right. The issues raised here are not debatable among jurists of reason, could not be resolved in a different manner, and do not deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For this reason, this court finds that a certificate of appealability should not issue in this case.

SIGNED at Houston, Texas, on March 15, 2002.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20570

THOMAS M GIESBERG
Petitioner - Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion ___, 5 Cir., _____, _____ F.3d _____)

(Filed Apr. 11, 2003)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

(×) Treating the Petitiocn for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R.APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 CAMP STREET
NEW ORLEANS. LA 70130

April 11, 2003

Mr Thomas M Giesberg
Texas Department of Criminal Justice
Institutional Division C T Terrell Unit
#721911
1300 FM 655
Rosharon, TX 77583

No. 02-20570 Giesberg v. Cockrell
USDC No. H-02-CV-264

Dear Mr. Giesberg:

We received your "Petition for Reconsideration by a Panel." In light of this Court's order of April 11, 2003 having already denied your petition for rehearing en banc, this appeal will remain closed. As such, no action will be taken on your petition for reconsideration This Court has entered its final order in this appeal and will not rule on upon [sic] the matter further.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ D. Mendez
Donna Mendez, Deputy Clerk
504-310-7677

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-20570

THOMAS M GIESBERG
Petitioner - Appellant

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
Respondent - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

---

(Filed Apr 1, 2003)

ORDER:

IT IS ORDERED that Appellant's "Motion for Additional Briefing" TREATED as a motion for leave to file supplemental rehearing en banc is DENIED.

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20570

THOMAS M GIESBERG
Petitioner - Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION
Respondent - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

---

(Filed Jan. 15, 2003)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

BY THE COURT:

A member of this panel previously denied Appellant's motion for Certificate of Appealability. The panel has considered Appellant's petition for reconsideration. IT IS ORDERED that the petition is Denied.

/s/ RHB /s/ FB /s/ HRD

APPENDIX H

Excerpts from Petitioner's "Motion for Additional Briefing" in light of *Miller-El v. Cockrell*, 537 U.S. 322 (February 25, 2003, filed March 3, 2003) in the Fifth Circuit Court of Appeals

* * *

1. Today, February 25, 2003, the United States Supreme Court decided *Miller-El v. Cockrell*, Supreme Court No. 01-7662.

* * *

2. The Supreme Court emphasized the need to issue a COA when matters are debatable, and not require the petitioner to prove he should prevail (for a COA).

* * *

4. Giesberg's "Petition for Rehearing En Banc" has as its first issue that merits en banc consideration:

> The decision conflicts with, ignores, and refuses to apply the debatability standard mandated by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), despite the fact that all authorities support the petitioner and were unrefuted, while no contrary authorities were found by the district or circuit judges.

The petition for rehearing en banc includes other arguments in support of the issuance of a COA.

5. Additional briefing will aid in applying *Miller-El v. Cockrell* to the question of whether the panel properly followed Supreme Court standards regarding the issuance of a COA under 28 U.S.C. §2253. Supreme Court construals of statutes are immediately applicable. See *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 90 (1993).

* * *

APPENDIX I

Excerpts from Petitioner's "Appellant's Petition for Rehearing En Banc" filed February 28, 2003 in the Fifth Circuit Court of Appeals [all emphasis in original]

* * *

The decision conflicts with, ignores, and refuses to apply the debatability standard mandated by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), despite the fact that all authorities support the petitioner and were unrefuted, while no contrary authorities were found by the district or circuit judges.

* * *

Slack, Id. at 484, incorporated "debatable among jurists of reason" from *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983), which noted, "obviously the petitioner need not show that he should prevail on the merits." *loc cit.*

* * *

Giesberg's circumstances are sui generis in this Circuit (but indistinguishable from those in *Ching v. United States*, 298 F.3d 174 (2nd Cir. 2002)): a post-exhaustion refiling made necessary by AEDPA restrictions, while the dismissal of the initial petition was under appeal. In response to the many authorities proving such a refiled petition is not "successive", **neither the district nor circuit judges cited a single authority refuting Giesberg's contentions**, yet a COA was denied.

* * *

This COA denial makes "debatable" a meaningless or unreachable standard. It is axiomatic that jurists of reason find an issue "debatable" when every authority entered in the debate supports the petitioner and is unrefuted.

* * *

APPENDIX J

Excerpts from "Petitioner's Motion to
Accept and File New Habeas Petition"
filed January 24, 2002
in the United States District Court
for the Southern District of Texas

* * *

However, several courts of appeals have held that the AEDPA prevents the amendment of new facts to a federal habeas petition past the one year period, even when it is unquestioned that the federal courts have obtained jurisdiction. *United States v. Duffus*, 174 F.3d 333, 337 (3rd Cir. 1999) (could "clarify a claim initially made," but not bring a "completely new" claim); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999) (if not "same set of facts" then "time-barred since it was filed after the statutory period of limitation").

Accordingly, these exhausted claims are now presented within one year of the denial of the petition for rehearing to the Supreme Court, not counting days tolled under 28 U.S.C. §2244(d)(2).

V.

This new petition presents "nonfrivolous claims developed in the subsequent state exhaustion proceedings." It "is to be treated as 'any other first petition' and is not a second or successive petition," nor is it "restricted to the claims made in [the] initial petition." *Slack v. McDaniel*, 529 U.S. 473, 487, 120 S.Ct. 1595, 1605 (2000).

* * *

Now, state remedies have been exhausted, so this new petition should govern, and it will be "more appropriate to treat the initial mixed petition as though it had not been filed" *Slack, supra* at 487-88, 120 S.Ct. at 1606.

* * *

Should this Court find it desirable or necessary, Petitioner agrees to have this new petition construed as an amendment to the first petition.

VI.

Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120 (2001) also supports the idea that the AEDPA limitation period resumed running after the denial of Petitioner's state habeas petition, despite the pendency of the first federal habeas petition in the Court of Appeals; ...

* * *